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In the Supreme Court of the United States

OCTOBER TERM, 1946

Nos. 391, 392, 393

SAMUEL OKIN, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings and opinion of the Commission rendered on January 22, 1944 (R. 11–34), have not yet been officially reported but have been published as Holding Company Act Release No. 4855. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 256–65) is reported at 154 F. 2d 27.

JURISDICTION

The orders of the Circuit Court of Appeals with respect to which writs of certiorari are sought were rendered on March 28, 1946 (R. 104–

105, 184–85, 254–55). An order of Mr. Justice Black, dated June 21, 1946, extended to August 12, 1946, the period during which a petition for writs of certiorari might be filed (R. 268), and the petition was filed on August 12, 1946. Service was effected on October 3, 1946. The jurisdiction of this Court is invoked by petitioner under Section 24 (a) of the Public Utility Holding Company Act of 1935 (49 Stat. 803, 834–835, 15 U. S. C. § 79 x (a)), and Section 240 (a) of the Judicial Code, as amended (28 U. S. C. § 347 (a)).

STATUTE INVOLVED

The statute involved is the Public Utility Holding Company Act of 1935 (49 Stat. 803, 15 U. S. C. § 79, hereinafter referred to as "the Act"). Pertinent sections of the Act are set forth in the Appendix, *infra*.

QUESTIONS PRESENTED

1. Whether a public utility holding company, which has been denied such an exemption by an administrative order no longer subject to review, is completely exempted from the provisions of the Holding Company Act solely by virtue of the fact that all its operating subsidiaries are located in foreign countries.

2. Whether an administrative order authorizing the temporary refunding of an inter-corporate debt claim, subject to certain conditions designed to maintain the status quo pending de-

termination or the rank and status of the debt claim in an appropriate administrative proceeding, is an "injunction" beyond the power of the Commission under the Holding Company Act, either because of lack of affirmative authority to issue such an order or because of limitations on the Commission's powers said to be contained in Section 26 (c) of the Act.

STATEMENT

The petitions for writs of certiorari seek review of judgments of the Circuit Court of Appeals affirming three related orders of the Securities and Exchange Commission under the Public Utility Holding Company Act of 1935. The first order, dated January 22, 1944, is the basic order involved. This order approved and authorized consummation of certain transactions proposed by Electric Bond and Share Company ("Bond and Share"), and its subsidiary, American & Foreign Power Company, Inc. ("Foreign Power"), both registered holding companies, including the issuance of a note by Foreign Power to Bond and Share, subject to conditions proposed by the Commission and accepted by the companies. The second and third orders, dated respectively April 25, 1945, and August 17, 1945, merely extended upon the same terms and conditions the maturity date of a certain note issued pursuant to the first order. Disposition of prior motions relating to the petition for review of the

first order had determined, contrary to the Commission's contention, that petitioner had standing to challenge the order as a "person aggrieved" and that his petition was not required to be dismissed or the order summarily affirmed on the ground of frivolousness. *Securities and Exchange Commission* v. *Okin*, 325 U. S. 385, 392.

Bond and Share is the top holding company in an extensive utility system comprising domestic and foreign properties. Control over the foreign properties is exercised through Foreign Power, a sub-holding company.[1]

Foreign Power is a Maine corporation having securities widely distributed among investors throughout the United States. All of the operations of its operating subsidiaries are located outside the United States. Under Sections 3 (a) (5) and 3 (b) of the Act, the Commission may exempt from some or all of the provisions of the Act companies not deriving any material part of their income from sources within the United States. In a prior administrative proceeding under these subsections the Commission granted Foreign Power an exemption limited to such of its activities as

[1] Bond and Share's control over the domestic properties is exercised through four sub-holding companies three of which are in various stages of dissolution or reorganization under Section 11 of the Act. Dissolution orders against two of these companies are involved in *American Power & Light Company* v. *Securities and Exchange Commission*, and *Electric Power & Light Corporation* v. *Securities and Exchange Commission*, Nos. 4 and 5, Oct. Term, 1946, which were reargued on October 14 and 15, 1946.

the Commission deemed essentially foreign in their nature and effect. *American & Foreign Power Company, Inc.*, 6 S. E. C. 396. Petitioner did not participate in the earlier proceeding, and the Commission's order, entered in 1939, has long ceased to be subject to review. The financial transaction involved in the instant case is not within the scope of the partial exemption granted in 1939, nor does petitioner contend that it is. Rather his argument in this connection, as more fully discussed below, is that the statute does not by its terms, and could not constitutionally, give the Commission jurisdiction in any respect over the affairs of Foreign Power.

Foreign Power is a subsidiary of Bond and Share (within the meaning of Section 2 (a) (8) of the Act) by virtue of Bond and Share's ownership of 40.22% of the voting power of Foreign Power, represented by common stock, as well as various percentages of the different issues of preferred stock of Foreign Power. Until January 22, 1944, Bond and Share also held a $35,000,000 note of Foreign Power, bearing interest at 7%, which had been executed by Foreign Power prior to the passage of the Act. This note had been treated by the parties as overdue after February 15, 1943, and thereafter interest had been paid at the legal rate of 6% (R. 13–14).

The Commission's concern as to whether repayment of this note in its entirety would be consistent with the provisions of the Act was re-

flected as far back as 1941 when, in orders licensing certain payments by Foreign Power to Bond and Share, the Commission reserved jurisdiction "over all aspects of all classes of indebtedness existing * * * between Bond and Share and American Foreign" (R. 19).

On May 18, 1943, the Commission entered an order reconvening hearings in a proceeding under Section 11 (b) (2) of the Act[2] with respect to Bond and Share and Foreign Power, the order declaring that among the issues to be considered at the reconvened hearings were to be (1) whether compliance with the requirements of Section 11 (b) (2) would require "a recapitalization or reorganization" of Foreign Power, and (2) if such recapitalization or reorganization were to be required, "what shall constitute a fair and equitable recognition of the respective claims in and against American & Foreign Power Company, Inc., therein" (R. 19).

[2] Under Section 11 (b) (2) it is the duty of the Commission generally to require registered holding companies and their subsidiaries to take such steps as may be necessary "to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system." It may be noted that the dividend arrearages on Foreign Power's preferred stocks, as of June 30, 1943, totaled some $288,000,000, and that voting control was exercised by the common stock which was some $200,000,000 under water (R. 14–15). Since 1943 dividend arrearages on the preferred stocks have mounted.

Thereafter, during the pendency of this administrative proceeding, Foreign Power submitted to the Commission a proposal for repayment of the $35,000,000 note in full, through the use of $5,000,000 of cash on hand and $30,000,000 to be borrowed from unaffiliated banks at interest not to exceed 3%. However, in view of extensive and complex problems relating to the rank and status of the debt claim,[3] which had not only been raised in the earlier Commission proceeding under Section 11 (b) (2) but were also involved in stockholders' suits brought in state courts on behalf of Foreign Power (R. 20), the management of Foreign Power submitted a stopgap proposal to the Commission in which it was joined by Bond and Share. The new application, which was designed to resolve the matter pending final determination with respect to the rank and status of the debt claim, provided for payment of $5,000,000 in cash and the refunding of the $30,000,000 balance through the issuance of five new 3% notes to Bond and Share, the first four notes in the amount of $3,000,000 each (the first being payable January 22, 1945, the others annually thereafter), and the fifth note in the principal amount of $18,000,000 maturing at the end of five years (R. 16–18).

[3] *Cf. Taylor* v. *Standard Gas & Electric Co.*, 306 U. S. 307 (the "Deep Rock" case); *Pepper* v. *Litton*, 308 U. S. 295.

Samuel Okin, owner of 9,000 shares of the common stock of Bond and Share out of a total of 5,250,357.66 of such shares outstanding, was granted a privilege of limited participation at the hearing, at which time he opposed the amended proposals of Foreign Power and Bond and Share (R. 21–22).

On January 22, 1944, the Commission issued its order approving the amended proposal (R. 35–40), and the transactions proposed were consummated on the same day. The said order contained several conditions, one of them being a reservation of jurisdiction in the Commission with respect to determining the rank and status of the debt claim. To make that reservation effective, another condition in the order prohibited any payments by Foreign Power to Bond and Share on the principal of any of the aforementioned 3% serial notes, at maturity or otherwise, prior to the determination of the rank and status of the debt claim represented by them, except pursuant to permission of the Commission. The latter condition, which was also incorporated into the other two administrative orders complained of, is the only part of the Commission's action of which petitioner complains.

Subsequently, Foreign Power and Bond and Share jointly filed with the Commission a plan for the reorganization of Foreign Power under Section 11 (e) of the Act, which permits companies to submit voluntary plans for compliance

with the provisions of Section 11 (b). The plan proposes, among other things, that the 3% serial notes in the principal amount of $30,000,000, together with other securities held by Bond and Share, be surrendered to Foreign Power for the consideration, among other things, of the receipt by Bond and Share of cash, debentures, and common stock of Foreign Power. The proceeding on the Section 11 (e) plan was consolidated with the earlier proceeding under Section 11 (b) (2).[4] Hearings in the consolidated proceedings were begun on December 12, 1944, and are still in progress. The Commission has not yet given its permission to any payment by Foreign Power or any receipt by Bond and Share on the principal of any of the serial notes.

On April 25, 1945, the Commission entered the second order complained of, permitting to become effective a declaration of Foreign Power and Bond and Share which extended the maturity date of the first serial note from January 22, 1945, to July 22, 1945 (R. 122–24). The third order complained of was entered August 17, 1945, further extending the maturity date of this note to January 22, 1946 (R. 208–11). Both orders, in effect, incorporated by reference the conditions contained in the earlier order.

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[4] *American & Foreign Power Company, Inc., et al.*, Holding Company Act Release No. 5388. Copies of this release are being filed with the clerk.

Prior to the decision of this Court on Okin's standing as a "person aggrieved" under Section 24 (a), the Commission had filed with the Circuit Court of Appeals, in support of its motion for dismissal or summary affirmance, so much of the administrative record as it thought necessary for disposition of the motion. The record so filed consisted in principal part of the applications of the companies, the transcript of oral testimony, and the findings and opinion and order of the Commission. Subsequently, in its opinion on Okin's standing as a "person aggrieved", this Court made it clear that—

> The court below has discretion to deal with the problem of the necessity of a record, and the extent thereof, in connection with a motion to dismiss or affirm on the ground that the petition for review is frivolous (325 U. S. at 392–393).

Thereafter, in the proceeding involving the basic administrative order of January 22, 1944, the Commission renewed its motion in the Court below for dismissal of the petition for review or summary affirmance of the order complained of, upon the basis of the record already on file with the Court. Okin made a cross motion to require filing of the balance of the administrative record. Both motions were denied. The proceeding was heard in the ordinary course upon the record already on file, and the Commission's order was affirmed. At the same time the Court affirmed

the Commission's extension orders, dated April 25, 1945, and August 17, 1945, upon records the sufficiency of which was not challenged.

Upon the present petition for writs of certiorari, Okin does not complain of the action of the Court below in affirming the Commission's order of January 22, 1944, upon something less than the entire administrative record, so we do not understand that question to be in issue.[5] Also not in issue, as we understand the petition, are certain allegations contained in the petition, but not specifically complained of in the court below or in the specifications of error urged in the petition (see Pet. 16–18), with respect to Commission "duress" against officers of the companies and procedural irregularities with respect to the extension orders.

ARGUMENT

The specifications of error urged by petitioner involve issues upon which the lower federal courts have been unanimous in upholding the Commission, or which have never been the subject of litigation, perhaps because the statute, as we shall show, is clear on its face in respect of the matters complained of.

It should be emphasized, moreover, that petitioner's position essentially is to deny to the man-

[5] It may be noted that the stipulation for the printing of the record in the instant proceeding omits a considerable portion of even the abbreviated record filed in the Circuit Court of Appeals (R. 266–67).

agement of the companies and to the Commission the right to maintain the status quo pending resolution of the controversy as to the indebtedness in question. *Cf. Continental Ill. National Bank & Trust Co.* v. *Chicago, Rock Island & Pacific R. R.*, 294 U. S. 648. In seeking to invalidate the condition (accepted by the companies) which prohibits payment of the principal amount of the notes except upon permission by the Commission, petitioner prematurely seeks to accomplish by indirection what he could not do directly, i. e., foreclose to the Commission and to any court later presented with the case the right to examine the debt claim vis-a-vis other publicly held claims, and to determine whether subordination is necessary in conformity with the "Deep Rock" principle.

Petitioner's justification for this course is, in part, an argument that the Commission does not under the Act, and cannot, as a matter of constitutional law, have jurisdiction in any respect over Foreign Power because all its operating subsidiaries are located abroad. We turn first to this aspect of the petition.

1. This issue has not been before the courts. The management of the Bond and Share system, which has never meekly accepted the regulatory provisions of the Act,[6] has apparently been satis-

[6] That management has twice brought to this Court appeals in which it challenged the constitutionality of the Act. *Elec-*

fied with the partial exemption granted to Foreign Power in 1939. We think the reason is clear on the face of the statute.

The Act defines "holding company" and "subsidiary" in functional terms, without reference to geographical location,[7] and flatly subjects companies within these definitions to the various regulatory provisions thereof.[8] Section 3 (a) of the Act provides in pertinent part:

> The Commission * * * shall exempt any holding company * * * from any provision or provisions of this title, unless and except insofar as it finds the exemption detrimental to the public interest or the interest of investors or consumers, if—
>
> * * * * *
>
> (5) Such holding company is not, and derives no material part of its income, directly or indirectly, from any one or more subsidiary companies which are, a company

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tric Bond and Share Company v. *Securities and Exchange Commission*, 303 U. S. 419. Also see cases cited at note 1, *supra*. Compare *American Gas & Electric Company*, 9 S. E. C. 247, in which one of the five principal sub-holding companies in the Bond and Share system unsuccessfully sought a declaration that it was not a subsidiary of Bond and Share.

[7] Section 2 (a) (7), (8).

[8] Section 5 (a) requires every "holding company" to register, and the act of registration brings the regulatory system into effect with respect to such holding company and its "subsidiaries." Petitioner does not contend that Foreign Power (which has registered) is not a holding company within the meaning of Section 2 (a) (7) or a subsidiary of Bond and Share within the meaning of Section 2 (a) (8).

> or companies the principal business of which within the United States is that of a public-utility business.

Section 3 (b) authorizes a similar exemption "from any provision or provisions of this title, the application of which to such subsidiary company the Commission finds is not necessary in the public interest or for the protection of investors, if" its interests are foreign in character.

The manifest purpose of these provisions is to protect American investors and the public interest while at the same time, as stated by the Commission in the 1939 Foreign Power exemption proceeding, to leave "companies operating in foreign countries * * * largely * * * free from the jurisdiction of this Commission with respect to such of their activities as are essentially foreign in their nature and effect." *American & Foreign Power Company, Inc.*, 6 S. E. C. 396, 403. Petitioner does not contend that the partial exemption granted to Foreign Power in that case embraces the type of financial transaction involved in the instant case. His argument is that there is nothing in the Act which gives the Commission jurisdiction over a domestic holding company having foreign subsidiaries—a contention which ignores the express language of the statute. He further contends that he is not concluded by the failure of Foreign Power, Bond and Share, or any of the security

holders, including himself, to file a timely petition for review of the 1939 order.

As to petitioner's point, not raised below, that Congress could not constitutionally exercise jurisdiction over such a company, no one has ever disputed the fact, least of all the petitioner, that the securities of Foreign Power are widely held by investors throughout the United States or that the company employs the mails and instrumentalities of interstate commerce in pursuance of its business as a holding company. Finding, as it did, that investors in many states were suffering as a result of abuses in the public utility holding company field,[9] Congress clearly had the power to protect such investors through its controls over use of the mails and instrumentalities of interstate commerce.[10]

2. The only respect in which petitioner specifically complains of the administrative orders in issue is that in each of them the Commission's

[9] See, *e. g.*, Sec. 1 (a) (1), 1 (b) (1), and 1 (c).

[10] Okin states that in early administrative proceedings the Commission did not question the right of holding companies owning only foreign subsidiaries to a complete exemption from the provisions of the Act (Pet. 42). Actually, the proceedings cited did not involve complete exemptions. See particularly *Middle West Utilities Company of Canada Limited*, 2 S. E. C. 505. Even if they did, the authority for partial exemptions is clear on the face of the statute. Section 3 (a), which is quoted at pp. 13–14, *supra*, provides that administrative exemptions may extend to "any provision or provisions of this title." Section 3 (b) conditions exemption from "any provision" upon public interest findings by the Commission.

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approval of the transaction proposed by the companies is subject to the condition that the principal amount of the notes should not be paid without application to and permission by the Commission. Petitioner states that these conditions are in effect "injunctions" for which there is no warrant in the Act. Under specific statutory provisions referred to below, violation of Commission orders is declared to be unlawful, and subject to penal sanctions (see Sec. 29). Orders carrying penal sanctions are, of course, very much like injunctions with the difference that violation does not constitute contempt as such. Apparently petitioner's contention is that the issuance of any order under the Holding Company Act compelling or prohibiting action is a usurpation of judicial power, regardless of statutory authority therefor. This issue has not previously been litigated, although similar conditions are commonly imposed by the Commission. Again, it is submitted that the statute is clear on its face.

Foreign Power's proposal to issue notes, whether (as originally proposed) to commercial banks or (by amendment) to Bond and Share, was subject to the requirement of Commission authorization under Sections 6 and 7 of the Act. Under these provisions it was the duty of the Commission to deny effectiveness to the proposal if it found, *inter alia*, that—

> the terms and conditions of the issue or sale of the security are detrimental to the

> public interest or the interest of investors or consumers. (Section 7 (d) (6).)

Section 7 (f) provides as follows:

> Any order permitting a declaration to become effective may contain such terms and conditions as the Commission finds necessary to assure compliance with the conditions specified in this section.

These provisions are in themselves broad enough to have authorized the Commission in permitting the issuance of the new notes to impose conditions designed to preserve the status quo pending ultimate resolution of the controversy over the rank and status of the Bond and Share debt claim.

In addition, Section 12 gives the Commission broad powers to deal with inter-company payments. Thus Section 12 (c) makes it unlawful for any registered holding company or any subsidiary thereof to retire securities in contravention of Commission rules or orders deemed "necessary or appropriate to protect the financial integrity of companies in holding-company systems * * * or to prevent the circumvention of the provisions of this title or the rules, regulations, or orders thereunder." And Section 12 (f) is broadly applicable to authorize the Commission by rule or order to restrain "any step in the performance of any transaction not otherwise unlawful under this title, with any company in the same holding-company system" if the Commission deems such re-

straint necessary or appropriate for the protection of investors "or to prevent the circumvention" of the Act.

The Senate Banking and Currency Committee said that through Section 12 and Section 13 (the latter dealing with service and construction contracts) "complete regulation of intercompany transactions is provided to prevent the milking of operating companies in the interest of the controlling holding-company groups."[11] Of Section 12 (f) in particular the Committee said that "it embraces all transactions not otherwise unlawful under title I."[12]

The ultimate goal of the pending administrative proceedings relating to Foreign Power is to bring about compliance by Foreign Power with the corporate simplification provisions of Section 11 (b) (2) of the Act and to determine whether plans to accomplish such compliance are "fair and equitable" in accordance with the standards of Sections 11 (e) or 11 (d). As previously stated, the Commission has before it a Section 11 (e) plan filed by Foreign Power and Bond and Share. One of the major issues presented in the proceeding is the equitable status of the Bond and

[11] S. Rep. No. 621, 74th Cong., 1st Sess., 34.

[12] *Id.*, 35. The Committee also said of the cognate provisions of Section 12 (d), which, like Sections 12 (c) and (f), authorizes the Commission "to prevent the circumvention of the provisions of this title," that they were "essential to prevent piecemeal evasion of the reorganization safeguards set up in section 11." *Id.*, 35.

Share debt claim. In entering the orders under review, the Commission found the conditions objected to by petitioner necessary to preserve the status quo until this issue could be determined. If, as petitioner contends, the Commission were powerless to impose such conditions, there would be danger of circumvention of the fair and equitable standard.[13]

3. Petitioner's construction of Section 26 (c) [14] is one which has been uniformly rejected by the lower courts, as more fully discussed, *infra*.

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[13] See note 12, *supra*. We have discussed only a few of the sections of the Act relied on by the Commission as the basis for the orders under review.

[14] Section 26 (c) provides as follows:

"(c) Nothing in this title shall be construed (1) to affect the validity of any loan or extension of credit (or any extension or renewal thereof) made or of any lien created prior or subsequent to the enactment of this title, unless at the time of the making of such loan or extension of credit (or extension or renewal thereof) or the creating of such lien, the person making such loan or extension of credit (or extension or renewal thereof) or acquiring such lien shall have actual knowledge of facts by reason of which the making of such loan or extension of credit (or extension or renewal thereof) or the acquisition of such lien is a violation of the provisions of this title or any rule or regulation thereunder, or (2) to afford a defense to the collection of any debt or obligation or the enforcement of any lien by any person who shall have acquired such debt, obligation, or lien in good faith for value and without actual knowledge of the violation of any provision of this title or any rule or regulation thereunder affecting the legality of such debt, obligation, or lien."

Initially it may be noted that the construction of Section 26 (c) is not even involved in this case, for, as observed by the court below (R. 264):

> Even under the petitioner's interpretation we fail to see how the orders on review would conflict with section 26 (c) for they do not pass upon the validity of the original loan nor subordinate its collection to the rights of other security holders of Foreign Power. They merely postpone maturity of the renewal notes until those questions shall have been decided in another proceeding. What that decision will be is as yet unknown.

Petitioner's argument is that Section 26 (c) operates as a limitation upon the Commission's function of effectuating "fair and equitable" reorganizations of holding company systems under Section 11. "If this view be sound", as Judge Leahy stated with respect to a similar contention involving the subsection, "it would seem that Congress has unwittingly nullified its own purpose in creating the Act in the first place." [15]

Petitioner's argument, apart from a misreading of Section 26 (c) itself, reads the subsection out of context. The entire section, of which subparagraph (c) is a part, relates, as its title suggests, to "Validity of Contracts." It deals broadly with contracts in conflict with the Act (or rules or orders thereunder). Subparagraph

[15] *In re American Gas & Power Co.*, 55 F. Supp. 756, 759–60 (D. Del).

(a) deals with contracts to waive compliance, which are declared void. Subparagraph (b) deals with contracts in violation of the Act, or contracts which may have been entered into prior to the Act, as well as thereafter, the performance of which may involve a violation. Such contracts are declared void except as concerns the rights of innocent persons. Subsection (c) merely restates in affirmative language the qualification in subsection (b) safeguarding the rights of innocent persons, giving it a scope already implicit in subsection (b) itself. Certainly there was nothing in the manner of its introduction into the Act to indicate an intent by Congress that it should override the affirmative regulatory powers elsewhere conferred upon the Commission.[16]

But even if the widest possible construction were given to Section 26 (c), it is difficult to see how it would have any application to the present case since neither the Commission's order nor the conditions disputed by petitioner are premised upon an otherwise valid contract being rendered invalid

[16] Section 26 as contained in the early Holding Company bills contained the existing subsections (a) and (b), but not subsection (c). After passage by the Senate in that form (S. 2796, 74th Cong., 1st Sess.), the bill's sponsor in the House proposed, as a committee amendment, that subsection (c) be appended to Section 26. He offered no explanation of the amendment, and it was agreed to without comment from anyone (79 Cong. Rec. 10567). The Conference Committee retained the subsection without change and without even mentioning it in the Conference Report (H. Rep. No. 1903, 74th Cong., 1st Sess.).

by reason of the Act or upon using the Act as a defense to the collection of a debt by any person having acquired the same without knowledge "of the violation of any provision of this title or any rule or regulation thereunder affecting the legality of such debt." Even if subsection (c) were intended to serve some broader purpose than merely to qualify the invalidity of contracts referred to in the earlier subsections, it obviously was not intended to prevent the Commission from either restraining the enforcement of invalid or inequitable intercompany claims, or from exercising the reorganization powers conferred by Sections 11 (c) and (d), under which the holder of a valid debt claim against a solvent company may be required to accept as an equitable equivalent satisfaction otherwise than in accordance with the letter of his bond, and under which the Commission in determining whether a plan is fair and equitable must give weight so far as relevant in the context of the Act to the same type of equitable considerations which have been applied by the courts.[17]

Petitioner cites no authorities in support of his interpretation and we know of none. The courts have uniformly rejected similar contentions. See *In re United Gas Corporation*, 58 F. Supp. 501,

[17] See *Taylor* v. *Standard Gas & Electric Company*, 306 U. S. 307.

514 (D. Del.) (a Section 11 (e) reorganization in which a Bond and Share debt claim against a subsidiary was compromised after the Commission had taken the view that it should not fairly and equitably be paid in full); *In re American Gas and Power Company,* 55 F. Supp. 756 (D. Del.) (in which the modification of a debenture agreement as an incident to a fair and equitable plan was upheld against the contention of the debenture trustee that it resulted in a dilution of the lien provided for in the debenture agreement); *In re Laclede Gas Light Company,* 57 F. Supp. 997, 1008–1010 (E. D. Mo., 1944), *affirmed, sub nom. Massachusetts Mutual Life Insurance Company* v. *Securities and Exchange Commission,* 151 F. 2d 424 (C. C. A. 8), certiorari denied, March 25, 1946, No. 802, Oct. Term, 1945 (involving the retirement of bonds without a premium as an incident to a fair and equitable plan, notwithstanding the presence of a premium provision in the contract). *Cf. In re Standard Gas and Electric Company,* 151 F. 2d 326 (C. C. A. 3), upholding the power of the Commission to approve a plan satisfying bond owners' claims through an allocation of portfolio assets consisting largely of common stocks of subsidiaries.

CONCLUSION

The decision of the Court below is clearly correct, and no questions are presented which war-

rant consideration by this Court. The petition for writs of certiorari should be denied.

Respectfully submitted,

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OCTOBER 1946.

APPENDIX

Pertinent sections of the Public Utility Holding Company Act of 1935, 49 Stat. 803, *et seq.*, 15 U. S. C. 79, *et seq.*, follow:

SEC. 2. (a) When used in this title, unless the context otherwise requires—

* * * * *

(7) "Holding company" means—

(A) any company which directly or indirectly owns, controls, or holds with power to vote, 10 per centum or more of the outstanding voting securities of a public-utility company or of a company which is a holding company by virtue of this clause or clause (B), unless the Commission, as hereinafter provided, by order declares such company not to be a holding company; * * *

* * * * *

(8) "Subsidiary company" of a specified holding company means—

(A) any company 10 per centum or more of the outstanding voting securities of which are directly or indirectly owned, controlled, or held with power to vote, by such holding company (or by a company that is a subsidiary company of such holding company by virtue of this clause or clause (B)), unless the Commission, as hereinafter provided, by order declares such company not to be a subsidiary company of such holding company; * * *

* * * * *

SEC. 3. (a) The Commission, by rules and regulations upon its own motion, or by order upon application, shall exempt any holding company, and every subsidiary company thereof as such, from any provision or provisions of this title, unless and except insofar as it finds the exemption detrimental to the public interest or the interest of investors or consumers, if—

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(5) such holding company is not, and derives no material part of its income, directly or indirectly, from any one or more subsidiary companies which are, a company or companies the principal business of which within the United States is that of a public-utility company.

(b) The Commission, by rules and regulations upon its own motion, or by order upon application, shall exempt any subsidiary company, as such, of a holding company from any provision or provisions of this title, the application of which to such subsidiary company the Commission finds is not necessary in the public interest or for the protection of investors, if such subsidiary company derives no material part of its income, directly or indirectly, from sources within the United States, and neither it nor any of its subsidiary companies is a public-utility company operating in the United States.

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SEC. 6. (a) Except in accordance with a declaration effective under section 7 and with the order under such section permitting such declaration to become effective, it shall be unlawful for

any registered holding company or subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, directly or indirectly (1) to issue or sell any security of such company; or (2) to exercise any privilege or right to alter the priorities, preferences, voting power, or other rights of the holders of an outstanding security of such company.

* * * * *

SEC. 7. (a) A registered holding company or subsidiary company thereof may file a declaration with the Commission, regarding any of the acts enumerated in subsection (a) of section 6, in such form as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers. * * *

* * * * *

(b) A declaration filed under this section shall become effective within such reasonable period of time after the filing thereof as the Commission shall fix by rules and regulations or order, unless the Commission prior to the expiration of such period shall have issued an order to the declarant to show cause why such declaration should become effective. Within a reasonable time after an opportunity for hearing upon an order to show cause under this subsection, unless the declarant shall withdraw its declaration, the Commission shall enter an order either permitting such declaration to become effective as filed or amended, or refusing to permit such declaration to become

effective. Amendments to a declaration may be made upon such terms and conditions as the Commission may prescribe.

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(d) If the requirements of subsections (c) and (g) are satisfied, the Commission shall permit a declaration regarding the issue or sale of a security to become effective unless the Commission finds that—

(1) the security is not reasonably adapted to the security structure of the declarant and other companies in the same holding-company system;

(2) the security is not reasonably adapted to the earning power of the declarant;

(3) financing by the issue and sale of the particular security is not necessary or appropriate to the economical and efficient operation of a business in which the applicant lawfully is engaged or has an interest;

(4) the fees, commissions, or other remuneration, to whomsoever paid, directly or indirectly, in connection with the issue, sale, or distribution of the security are not reasonable;

(5) in the case of a security that is a guaranty of, or assumption of liability on, a security of another company, the circumstances are such as to constitute the making of such guaranty or the assumption of such liability an improper risk for the declarant; or

(6) the terms and conditions of the issue or sale of the security are detrimental to

the public interest or the interest of investors or consumers.

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(f) Any order permitting a declaration to become effective may contain such terms and conditions as the Commission finds necessary to assure compliance with the conditions specified in this section.

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SEC. 11. (b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

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(2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. * * *

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(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee,

to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed.

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SEC. 12. (c) It shall be unlawful for any registered holding company or any subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, to declare or pay any dividend on any security of such company or to acquire, retire, or redeem any security of such company, in contravention of such rules and regulations or orders as the Commission deems necessary or appropriate to protect the financial integrity of companies in holding-company systems, to safeguard the working capital of public-utility companies, to prevent the payment of dividends out of capital or unearned surplus, or to prevent the circumvention of the provisions of this title or the rules, regulations, or orders thereunder.

(d) It shall be unlawful for any registered holding company, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, to sell any security which it owns of any public-utility company, or any utility assets, in contravention of such rules and regulations or orders regarding the consideration to be received for such sale, maintenance of competitive conditions, fees and commissions, accounts, disclosure of interest, and similar matters as the Commission deems necessary or appropriate in the public interest or for the protection of investors or consumers or to prevent the circum-

vention of the provisions of this title or the rules, regulations, or orders thereunder.

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(f) It shall be unlawful for any registered holding company or subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, to negotiate, enter into, or take any step in the performance of any transaction not otherwise unlawful under this title, with any company in the same holding-company system or with any affiliate of a company in such holding-company system in contravention of such rules and regulations or orders regarding reports, accounts, costs, maintenance of competitive conditions, disclosure of interest, duration of contracts, and similar matters as the Commission deems necessary or appropriate in the public interest or for the protection of investors or consumers or to prevent the circumvention of the provisions of this title or the rules and regulations thereunder.

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SEC. 24. (a) Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon

any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. * * * The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

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SEC. 26. (a) Any condition, stipulation, or provision binding any person to waive compliance with any provision of this title or with any rule, regulation, or order thereunder shall be void.

(b) Every contract made in violation of any provision of this title or of any rule, regulation, or order thereunder, and every contract heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this title, or any rule, regulation.

or order thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, regulation, or order, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule, regulation, or order.

(c) Nothing in this title shall be construed (1) to affect the validity of any loan or extension of credit (or any extension or renewal thereof) made or of any lien created prior or subsequent to the enactment of this title, unless at the time of the making of such loan or extension of credit (or extension or renewal thereof) or the creating of such lien, the person making such loan or extension of credit (or extension or renewal thereof) or acquiring such lien shall have actual knowledge of facts by reason of which the making of such loan or extension of credit (or extension or renewal thereof) or the acquisition of such lien is a violation of the provisions of this title or any rule or regulation thereunder, or (2) to afford a defense to the collection of any debt or obligation or the enforcement of any lien by any person who shall have acquired such debt, obligation, or lien in good faith for value and without actual knowledge of the violation of any provision of this title or any rule or regulation thereunder affecting the legality of such debt, obligation, or lien.

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